

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

WHIDBEY ENVIRONMENTAL ACTION
NETWORK (WEAN),

Petitioner,

v.

ISLAND COUNTY,

Respondent.

CASE No. 17-2-0004

**ORDER FINDING NON-COMPLIANCE
(FAILURE TO ACT)**

This matter comes before the Board pursuant to numerous motions and correspondence filed by the parties. The Board has before it the following:

- Island County's Motion for More Definite Statement, February 22, 2017;
- Prehearing Order, March 1, 2017;
- WEAN's Response to County's Motion for More Definite Statement, March 2, 2017;
- WEAN's Motion to Supplement the Record or Take Official Notice, March 27, 2017;
- WEAN's Dispositive Motion, March 27, 2017;
- Island County's Motion to Dismiss Petition and/or Motion to Strike; March 27, 2017;
- Island County's Response to WEAN's Motion to Supplement the Record or Take Official Notice, April 4, 2017;
- Island County's Response and Motion to Strike WEAN's Dispositive Motion, April 4, 2017;
- WEAN's letter of April 4, 2017, objecting to the County's response;

- Island County's letter of April 5, 2017, referencing WEAN's letter;
- WEAN's Response to Island County's Motion to Dismiss, April 6, 2017.

The challenge presented by WEAN raised three issues which were included in the Board's Prehearing Order and are set forth below:¹

1. Has Island County failed to comply with the Growth Management Act's requirements for protection of critical areas (RCW 36.70A.040(3); §060(2)(3); §070(5)(c)(iv); §130(1)(b)(c)) and inclusion of the best available science (RCW 36.70A.172(1)) by failing to adopt regulations assuring that there is no net loss of critical area function on lands proposed to be developed after logging pursuant to Forest Practices Act non-conversion permits?
2. Has Island County failed to comply with the Growth Management Act's requirement to adopt development regulations implementing Comprehensive Plan policies (RCW 36.70A.040(3)) by failing to adopt implementing regulations for critical area goals and policies for lands proposed to be developed after logging pursuant to Forest Practices Act non-conversion permits?
3. Has Island County failed to comply with the Growth Management Act's requirements for protection of critical areas (RCW 36.70A.040(3); §060(2)(3); §070(5)(c)(iv); §130(1)(b)(c)) by failing to adopt a policy and regulations requiring that there be no net loss of function of Fish and Wildlife Habitat Conservation Areas? (emphasis added)²

Prior to³ and during the prehearing conference, Island County (County) requested that WEAN provide greater clarity regarding its alleged statutory violations. During the prehearing conference WEAN stated that it was alleging that the County should have taken action in 2016 to address the protection of the functions and values of critical areas affected by development allowed following forest practices. Based on the discussion at the prehearing conference, the Board then stated in the Prehearing Order, that "the Petitioner is challenging what it contends was a failure of the County to take action to protect critical areas affected by development following forest practices". Thereafter, WEAN filed its Response to County's Motion for More Definite Statement in which it stated in regard to its

¹ Prehearing Order (March 1, 2017).

² WEAN abandoned Issue 3. See WEAN's Response to Island County's Motion to Dismiss at 10.

³ Island County's Motion for More Definite Statement (February 22, 2017).

1 first two issues that it was alleging “that Island County was required by the Growth
2 Management Act to review and update its critical area regulations by June 30, 2016 . . .”. In
3 essence, WEAN alleges that the County has failed to complete its mandated RCW
4 36.70A.130(1)(c) critical area ordinance review, which it asserts was required to have been
5 completed by June 30, 2016.⁴ WEAN states:

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7 Critical area designations and regulations must be reviewed and updated
8 periodically. Island County was required to complete review and update of its
9 critical area regulations by June 30, 2016. It did not. Hence, the County is not
10 in compliance with this GMA requirement. Because the County is currently
11 out of compliance with this statutory deadline its failure to date to adequately
12 regulate development (“conversion”) of lands logged without permits
13 disclosing or approving future development is properly subject to Board
14 review. The issues raised in this appeal address this longstanding and
15 ongoing failure.⁵

16 The County admits that it has not completed its critical areas ordinance (CAO) review
17 but asserts that review is not due until June 30, 2017.⁶ The County argues the state has
18 “extended” the compliance date until June 30, 2017 from the RCW 36.70A.130 date of June
19 30, 2016, and thus it is not late on compliance with the update requirement. It cites Exhibits
20 2 and 172 attached to its Motion to Dismiss Petition for Review and/or Motion to Strike. It
21 then provides evidence that it has been making “substantial progress” towards completion
22 of its CAO update.

23 The Board agrees with WEAN’s position that the completion date was not extended
24 as the County suggests.⁷ Review of the cited exhibits clearly demonstrates that the
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27 ⁴ RCW 36.70A.130(5): Except as otherwise provided in subsections (6) and (8) of this section, following the
28 review of comprehensive plans and development regulations required by subsection (4) of this section,
29 counties and cities shall take action to review and, if needed, revise their comprehensive plans and
30 development regulations to ensure the plan and regulations comply with the requirements of this chapter as
31 follows:

32 (b) On or before June 30, 2016, and every eight years thereafter, for . . . Island [County].
RCW 36.70A.060(2) provides in part that: Each county and city shall adopt development regulations that
protect critical areas that are required to be designated under RCW 36.70A.170.

⁵ WEAN’s Dispositive Motion at 2.

⁶ “The County asserts that the statutory deadline for the County to complete its update to its CAO is June 30,
2017.” Island County’s Motion to Dismiss Petition for Review and/or Motion to Strike (March 27, 2017).

⁷ WEAN’s Dispositive Motion at 2-3; WEAN’s Response to Island County’s Motion to Dismiss at 2-5.

1 extension only applies to the ability of jurisdictions to qualify for certain grants and loans.⁸
2 Jurisdictions which are less than one year late in completing their RCW 36.70A.130 CAO
3 updates and which have completed other update requirements remain eligible to receive
4 those grants and loans provided they are making “substantial progress”.⁹

5 Based on that conclusion, the Board deems WEAN’s motion as one for summary
6 judgment. Under the Board’s Rules of Practice and Procedure, while the Board rarely
7 entertains a motion for summary judgment, it may do so in a case of failure to act by a
8 statutory deadline. WAC 242-03-555(1).

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10 Superior Court Civil Rule 56 addressing motions for summary judgment provides in
11 part as follows:

12 The judgment sought shall be rendered forthwith if the pleadings, depositions,
13 answers to interrogatories, and admissions on file, together with the affidavits,
14 if any, show that there is no genuine issue as to any material fact and that the
15 moving party is entitled to a judgment as a matter of law.

16 Here there is no genuine issue as to any material fact. In this instance, the Board has
17 determined that the County has failed to act by the statutory deadline of June 30, 2016. The
18 Board views WEAN’s action as constituting a “failure to act” claim. As the Board has held
19 on numerous occasions, the Growth Management Act (GMA) provides that a petition
20 relating to the failure of a jurisdiction to take action by a GMA deadline may be brought at
21 any time after the deadline has passed.¹⁰ The only relief available to a party under a claim
22 that a jurisdiction has failed to act by a GMA statutory deadline is an order compelling the
23 jurisdiction to take that action.¹¹ In that situation, no substantive arguments will be
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27 ⁸ Exhibit 48 at 1; Exhibit 172 at 1; Exhibit 2 at 4.

28 ⁹ Exhibit 2 at 4: “Technically the deadline did not change, but jurisdictions are not considered out-of-
29 compliance for the purposes of grants and loans if the CAO update is the only remaining part of the periodic
30 review.” See also Exhibit 172 in which the Department of Commerce states: “RCW 36.70A.130(1) requires that
31 counties and cities take action to review and revise, if necessary, their comprehensive plans and development
32 regulations, *including* their critical areas ordinances, every eight years. At this time, it appears you still need to
finalize the review and update of your critical area regulations.” (emphasis in original)

¹⁰ *Gain v. Pierce County*, GMHB No. 99-3-0019 (Order on Dispositive Motions, January 28, 2000) at 5, 6;
Futurewise v. Snohomish County, GMHB No. 05-3-0020 (Order on Motion to Dismiss, May 23, 2005) at 5.

¹¹ *Panesko v. Lewis County*, GMHB No. 98-2-0004 (Order Granting County’s Motion to Dismiss, June 12, 1998).

1 considered. Rather, the substance of any claim would be reviewable by the filing of a new
2 Petition for Review following adoption of the CAO review.¹²

3 On the basis of the Board's ruling finding and concluding that the County has failed to
4 complete its RCW 36.70A.130 mandate to review and, if needed, revise its comprehensive
5 plan policies and development regulations regarding critical areas, all as set forth above, the
6 Board need not consider any of the other motions, argument, and requests not specifically
7 addressed herein as there is no genuine issue as to any material fact and Petitioners are
8 entitled as a matter of law to a finding of non-compliance and remand.
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10 ORDER

11 The Board finds, concludes, and orders as follows:

- 12 1. WEAN's Dispositive Motion is considered a motion for summary judgment;
- 13 2. There is no genuine issue of material fact as to the statutory deadline for Island
14 County to take action to review and, if needed, revise its critical areas ordinance
15 on or before June 30, 2016;
- 16 3. There is no genuine issue of material fact as to Island County's failure to take
17 action to review and, if needed, revise its critical areas ordinance on or before
18 June 30, 2016;
- 19 4. Island County's failure to take action to review and, if needed, revise its critical
20 areas ordinance is clearly erroneous in light of the goals and requirements of the
21 GMA;
- 22 5. WEAN is entitled to judgment as a matter of law;
- 23 6. The Board has the firm and definite conviction that a mistake has been made by
24 Island County in failing to comply with RCW 36.70A.130 due to its failure to
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30 ¹² "Failure to act challenges are appropriate where a County has not adopted a comprehensive plan or has not
31 adopted any development regulations to implement the plan. See, for example, *WEAN v. Island County*,
32 WWGMHB No. 95-2-0063 (Order on Dispositive Motions, June 1, 1995). Once a county has adopted
development regulations to implement the plan, the challenge is no longer for failure to act but to the
sufficiency of that action." *Overton v. Mason County*, GMHB No. 05-2-0009c (FDO, August 25, 2005). *Diehl v.*
Mason County, GMHB No. 95-2-0073 (Finding of Compliance, February 22, 1996); *WEAN v. Island County*,
GMHB No. 12-2-0016 (Order Finding Compliance, October 24, 2014).

review and, if needed, revise its policies and development regulations regarding critical areas;

7. This matter is remanded¹³ to Island County to take action to review and, if needed, revise its policies and development regulations regarding critical areas;
8. The Board sets the following schedule for the County's compliance:

Item	Date Due
Compliance Due	June 30, 2017
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	July 14, 2017
Objections to a Finding of Compliance	July 28, 2017
Response to Objections	August 7, 2017
Telephonic Compliance Hearing Call 1 (800) 704-9804 and Use Pin 7757643#	August 15, 2017 10:00 AM

DATED this 14th day of April, 2017.

William Roehl, Board Member

Nina Carter, Board Member

Raymond L. Paoella, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.¹⁴

¹³ RCW 36.70A.300(3)(b).

¹⁴ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.

A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.